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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CHERYL PRUITT,
Individually and as Next Friend of
Tiffany Kacal, A Minor,
Petitioner

VS.

WACO INDEPENDENT SCHOOL DISTRICT,
WILLIAM AUFMAN, and WILLIAM G. GAMBLE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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34 pp

QUESTION PRESENTED

1. Do duly-adopted and published policies that limit and/or prohibit the use of corporal punishment by a public school district create a property interest sufficient to invoke the protections of the Due Process Clause of the Fourteenth Amendment when the district disregards its own adopted and published policies and procedures?

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES 2

LIST OF ALL INTERESTED PARTIES 5

CITATIONS FOR REPORTS OF LOWER COURT 6
DECISIONS IN THIS CASE

STATEMENT OF JURISDICTION 6
COURSE OF PROCEEDINGS BELOW
BASIS OF SUPREME COURT JURISDICTION

STATEMENT OF MATERIAL CASE FACTS 9

ARGUMENT 12

APPENDIX 21

INDEX OF AUTHORITIES

CASES:

Board of Regents of State Colleges v. Roth, ... 8, 12, 13, 14
408 U.S. 578, at 577

Boudeloche v. Grow Chemical Coatings Corp., ... 11
728 F.2d 759, 762 (5th Cir. 1984)

Campbell v. Wells Fargo Bank, N.A., ... 11
781 F.2d 440, 442 (5th Cir. 1986), cert. denied, 476 U.S. (1986)

Conley v. Gibson, ... 11
355 U.S. 41, 45-56 (1957)

Connell v. Higginbotham, ... 8, 13
403 U.S. 207

Cunningham v. Beavers, ... 14, 15
858 F.2d 269, 271-272, (5th Cir. 1988), cert denied, 498 U.S. 1067 (1989)

Doe v. Taylor Independent School District, ... 18
15 F.3d 443, 450 (5th Cir. 1994)

Fee v. Herndon, ... 14, 15
900 F.2d 804, 808-810 (5th Cir.), cert. denied, 498 U.S. 908 (1990)

Goss v. Lopez, ... 15
419 U.S. 565 (1975)

Hassan v. Lubbock Indep. Sch. Dist., ... 14
55 F.3d 1075, 1080 (5th Cir.), cert. denied, 116 S.Ct. 532 (1995)

CASES:

Ingraham v. Wright, ... 7, 8, 14, 15, 17, 19
430 U.S. 651 (1977)

Jefferson v. Ysleta Independent School District, ... 18
741 F.2d 303 (5th Cir. 1987)

Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc., ... 11
677 F.2d 1045, 1050 (5th Cir.)

McAlister v. Medina Elec., Co-op., Inc., ... 16
830 S.W.2d 659, 664 (Tex.App.--San Antonio, 1982, writ denied)

McDonald v. City of Corinth, ... 14, 16
102 F.3d 152, 156 (5th Cir. 1996)

Shillingford v. Holmes, ... 19
634 F.2d 263, 266 (5th Cir. 1981)

Weiman v. Updegraff, ... 8, 13
344 U.S. 183

Woodard v. Los Fresnos Indep. Sch. Dist., ... 14, 15, 17, 18
732 F.2d 1243, 1245 (5th Cir. 1984)

CONSTITUTIONAL PROVISIONS:

Eighth Amendment 19

Fourteenth Amendment 12, 18

FEDERAL STATUTES:

28 U.S.C. § 1254(1) 6

Rule 12(b)(6) of Federal Rules of Procedure 11

TEXAS STATE STATUTES:

Tex. Educ. Code, Sec. §25.093 19

Tex. Educ. Code, Sec. §25.094 19

Tex. Code of Crim. Proc., Article 2.12 19

TREATISES:

5 C. Wright and A. Miller,
Federal Practice and Procedure, ... 11
§1357 at 598, 601 (1969), cert. denied 459 U.S. (1983)

LIST OF INTERESTED PARTIES

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported. (Appendix, pages 1-6)

United States Court of Appeals for the Fifth Circuit: not reported.[1] (Appendix, pages 7-11)

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered judgment on the 29th of January, 1998. (Appendix, p.7)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from an Order of Dismissal entered by the United States District Court for the Western District of Texas, Waco Division.

This Petition is filed for two purposes: (1) to bring up a question of importance that significantly affected the outcome of this case and that is of grave public interest in civil rights and in the use of corporal punishment in public schools, and (2) to

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[1] Even though the the opinion of the Fifth Circuit is not published and has limited impact as legal precedent, Petitioner contends that the error in this case compels reconsideration to prevent injustice will occur repeatedly if the rationale adopted by the courts below is used as precedent for any future cases involving similar facts.

secure uniformity of decisions between the Circuit Court of Appeals and between this Supreme Court as follows.

This Petition poses the question: If a school district adopts an official policy mandating that the district "shall honor" a parent's request that corporal punishment not be administered to a child and if the parent requests that his/her child not be subjected to corporal punishment, and if the district had also adopted an official policy prescribing appropriate discipline for specific offenses and the disciplinary alternatives prescribed do not include any corporal punishment, do the district's policies create a property or liberty interest in avoiding corporal punishment that would invoke the protections of the Due Process Clause of the Fourteenth Amendment, either procedurally or substantively, or both?

In 1977, this Court held that the "Due Process Clause does not require notice and hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law." Ingraham v. Wright, 430 U.S. 651, 682 (1977), emphasis added. At the time, of Ingraham, 23 states had addressed the issue of corporal punishment through legislation, and only two of the 23 states had prohibited all corporal punishment in their public schools and only one state, California, had conditioned the use of corporal punishment on parental approval. (Id. at 664) Florida (Ingraham's home state) did not allow for parental participation in a corporal punishment decision, either by approval or disapproval. The Ingraham Court considered this background of "historical and contemporary approval of reasonable corporal punishment" in considering the constitutional questions presented. (Id.) The Court acknowledged that "elimination or curtailment of corporal punishment would be welcomed by many as a societal advance", but noted that "such a policy choice..."should result from the "normal processes of community debate and legislative action" rather than "from this Court's determination of an asserted right to due process." (Id. at 682)

Unlike Ingraham, this case involves specific policies that limited the use of corporal punishment and allowed parents to prohibit its use. The policies had been adopted by the school district following the "normal processes of community debate and legislative action" (per Ingraham at 682). The District, through its agents, violated its policies. The Fifth Circuit erroneously relied on Ingraham (and on prior Fifth Circuit decisions following Ingraham) even though the factual basis of this case is significantly different from Ingraham. The error compels reconsideration by this Court.

The Fifth Circuit held that the infliction of injury to a child through corporal punishment in violation of the district's policies did not implicate the due process clause because Texas state law "affords adequate post-punishment civil or criminal remedies" for the student. The post-punishment remedies cited as "adequate" actually exempt the District from any liability for violating the policies it adopted. To hold that such remedies are sufficient makes a mockery of the district's legislative process and its "policies." Contracts and "implied promises of continued employment" can create property interests in employment that are protected by the Due Process Clause. Weiman v. Updegraff, 344 U.S. 183; Connell v. Higginbotham, 403 U.S. 207. Statutes and administrative standards can create property interests in welfare benefits. *See* Board of Regents v. Roth, 408 U.S. 564, 575-577 (1972). People justifiably rely on contracts, statutes and policies in their daily lives and that reliance "must not be arbitrarily undermined." Roth at 577.

Children learn from examples set by their role models as well as from classroom instruction. Why should children be expected to follow rules if the school district is not held to the same standard? Today's parents are criticized for not being involved in their child's education. Will parents ever be involved if their input is invited but then unabashedly disregarded?

Statement of Material Facts[2]

Pruitt's daughter, Kacal, was formerly a student at G. L. Wiley Middle School in the WISD. On November 2, 1995, Kacal was charged with talking in the hallway at the school, allegedly in violation of rules of student conduct (R. 3, paragraph 8). The matter was reported to Mr. Gamble, a vice-principal at the school, by a teacher, Mr. Goodman, who witnessed the incident. Gamble told the teacher that Kacal was to receive "one lick" as discipline for the alleged violation (R. 3, paragraph 9).

Prior to this incident, Pruitt had advised Gamble that she did not approve of corporal punishment and did not give permission for corporal punishment to be administered to Kacal by school personnel (R. 3, paragraph 10). The WISD's Middle School Handbook stated:

> "The District **shall** honor a parent request that corporal punishment not be administered to his or her child; however, the District shall impose other disciplinary measures consistent with the offense. *Board Policy FOB and FOB (local)*" (R. 5, paragraph 20).

Nonetheless, Gamble instructed Mr. Goodman to take Kacal to the school office, where corporal punishment was to be administered.

Kacal and other students accused of rule violations were required to wait in the school office during the lunch period and

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[2] The factual allegations set forth herein are derived from the allegations in Plaintiff's Original Complaint and are referenced by Record page number and by numbered paragraph in the complaint ("R.____, paragraph ____").

Kacal was not allowed to eat lunch before returning to class (R. 6, paragraph 23), but ultimately Aufman did administer corporal punishment to Kacal and other students. Aufman did so by giving Kacal and other children "one lick" with a wooden paddle wrapped with ducting tape[3] (R. 5, paragraph 19).

The punishment given Kacal caused welts and bruises on her buttocks which persisted for a period in excess of eight days (R. 3-5, paragraphs 11-19).

In addition to Pruitt's claim that corporal punishment violated the policy published in the Middle School Handbook, Pruitt pleaded that the punishment violated other duly adopted WISD policies as follows:

1. The WISD Middle School Handbook also included a Zero Tolerance Behavior Management Plan which had been officially adopted by the WISD Board and which specifically prescribed disciplinary actions that were appropriate for various offenses but which did not prescribe corporal punishment for any listed offenses including the offense that Kacal allegedly committed (R. 5, paragraph 21); and

2. The Zero Tolerance Behavior Management Plan consistently provided for the parent to be notified in the event that discipline was imposed and the disciplinary forms adopted by the District clearly contemplated notice to the parent since

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[3] Pruitt alleged that "The instrumentality used for administering corporal punishment was designed to increase the probability of inflicting pain and injury to the child" (R. 5-6, paragraphs 19, 24).

the form included a space for the parent to sign acknowledging receipt of a copy of the disciplinary action form (R. 6, paragraph 22); and

3. The disciplinary action form relating to Kacal's alleged violation specifically states that Kacal was offered corporal punishment as an alternative to "calling parent" and Pruitt was never notified by the district that disciplinary action had been taken either before or after the corporal punishment (R. 6, paragraph 23).

Standard of Review

Motion to Dismiss. A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105 (1983), quoting 5 C. Wright and A. Miller, Federal Practice and Procedure §1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*" (emphasis added) Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984); Kaiser, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir.), cert. denied, 476 U.S. 1159, 106 S.Ct 2279, 90 L.Ed.2d 721 (1986). "The question therefore is whether in the light most favorable to plaintiff and with every doubt resolved in his behalf, the complaint states *any* valid claim for relief." (emphasis added), quoting 5 Wright and Miller, Federal Practice and Procedure, §1357 at 601.

Argument and Authorities

A. Procedural Due Process. The WISD had officially adopted a policy that compelled that administrators "**shall** honor" (emphasis added) parent requests not to administer corporal punishment and Pruitt made such a request prior to the incident at issue in this case.[4] The District's official policy Handbook also included a Zero Tolerance Behavior Management Plan that specifically prescribed disciplinary actions that were appropriate for various offenses but did **not** prescribe corporal punishment for any listed offenses including the offense that Kacal allegedly committed. The Zero Tolerance Plan also prescribed notice to parent(s) whenever disciplinary action was administered or was contemplated to be administered depending on the severity of the penalty. Pruitt's complaint alleged that these WISD official policies were violated by the administrators who participated in administering corporal punishment to Kacal.

Pruitt contended that the WISD's official policies created a property interest protected by the Fourteenth Amendment, entitling her at lkeast to procedural due process if corporal punishment was to be administered to her child. The district court and the Court of Appeals erred in holding that the policies were not sufficient to create such a property interest.

The Supreme Court has repeatedly recognized that "property" interests are not created by the Constitution, but are established by state laws, rules, or regulations from an independent source. Board of Regents of State Colleges v.

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[4] The District's policy did not give a minor child the right to supersede the parent's decision relating to corporal punishment, nor did it contemplate that the child would be allowed to conspire with the administration to withhold information from the parent, i.e. not tell the parent that disciplinary action had been enforced.

Roth, 408 U.S. 578, at 577. In Roth, the Court specifically stated:

> To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.
>
> . . .
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (at 577)

Although the Roth case involved an employment situation and the Court held that Roth had no constitutional liberty or property interest in continued employment, the Court noted that written contracts and "implied promises of continued employment" could form the basis of a "property interest" in continued employment that would be safeguarded by constitutional procedural due process rights, citing Weiman v. Updegraff, 344 U.S. 183, and Connell v. Higginbotham, 403 U.S. 207. The Roth Court also noted that there is no constitutional right to welfare, but a "property" interest in receiving welfare payments can be created by statutory and administrative standards defining eligibility for such benefits and the "property" interest created by such definitions would be safeguarded by procedural due process. (See Roth at 576-577 and 575, respectively). The same principles stated in Roth are applicable to the case at bar since the WISD enacted a policy

which entitled the parent to make the decision whether or not his or her child would be subjected to corporal punishment.

Neither the Court of Appeals or the district court analyzed the WISD policy or its relationship to the guidelines set forth in Roth. Instead, the Court affirmed dismissal of Pruitt's claims, stating that "She [Pruitt] cites no cases in which a school policy has been construed to create a property interest which implicates the Due Process Clause."

Despite the fact that Plaintiff cannot even at this time cite a case wherein a policy like the one in issue in this case has been construed to create a protected property interest, even the Fifth Circuit has acknowledged that, in employment situations, Texas courts have found that "a handbook or policy manual may modify the at-will relationship if it specifically and expressly curtails the employer's right to terminate the employee". McDonald v. City of Corinth, 102 F.3d 152, 156 (5th Cir. 1996). See also Texas state court cases cited in McDonald (at 156).

Ordinarily, neither a parent nor a student have a property interest to be free of corporal punishment in public schools.[5] As noted supra, this Court, in Ingraham v. Wright, 430 U.S. 651, rejected the procedural due process claims of a Plaintiff who complained that corporal punishment, without notice and hearing, had violated his right to due process; and Circuit Courts, including specfically the Fifth Circuit, have

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[5] Also, the mere fact that corporal punishment was administered and that injury occurred may not be a violation of substantive due process. Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1080 (5th Cir), cert. denied, 116 S.Ct. 532 (1995); Fee v. Herndon, 900 F.2d 804, 808-810 (5th Cir.), cert. denied, 498 U.S. 908 (1990); Cunningham v. Beavers, 858 F.2d 269, 271-272 (5th Cir. 1988), cert. denied, 498 U.S. 1067 (1989); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1245 (5th Cir. 1984).

followed suit for the past twenty years. However, the Ingraham Court analyzed the Plaintiff's procedural due process issue within the framework of a "liberty" rather than a "property" interest.[6] In Ingraham, the school district had not adopted any policy whereby the parent was entitled to disapprove of corporal punishment and thereby force the district to utilize other means of discipline; therefore, the Plaintiff had to rely solely on a "liberty" interest to support his due process claim. This case is clearly distinguishable from the factual basis of the Ingraham case and is distinguishable from the facts and claims asserted by other Plaintiffs in the Fifth Circuit cases that were cited to the courts by Respondents in support of their Motion to Dismiss, see, e.g., Herndon, 900 F,2d at 808 (5th Cir. 1990), wherein the Plaintiff relied solely on a "liberty" interest, asserting an action for violation of substantive due process claiming excessive corporal punishment, but there was no allegation of a school district policy akin to the corporal punishment "opt out" policy at issue in this case, and the defendants alleged that the mother of the plaintiff specifically authorized corporal punishment of the child by signing a special education consent form allowing for such punishment; Cunningham v. Beavers, 858 F.2d at 271-272 (5th Cir. 1988), cert. denied, 498 U.S. 1067 (1989), wherein the Plaintiff also relied solely on a "liberty" interest, without an "opt out" policy having been adopted by the school district. Although the Fifth Circuit has held that parental consent to corporal punishment is not constitutionally required in Woodard v. Los Fresnos Independent School Dist., 732 F.2d at 1244, the Court also specifically noted that the Woodward complaint did "not allege that she suffered any injury as a result or that the

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[6] The same court, in Goss v. Lopez, 419 U.S. 565 (1975), found that an Ohio statute and regulations implementing disciplinary school suspensions were constitutionally impermissible because the statute and regulations did not include due process provisions sufficient to protect the students' property and/or liberty interests in educational benefits.

strokes were administered with undue severity" (at 1245). Also, it appears that the Woodard complaint did not allege a violation of the due process rights of the parent, but relied solely on the right of the student (at 1245), who apparently consented.

The general rules applicable to corporal punishment in the cases following Ingraham are somewhat analogous to the general rule of "at-will" employment in Texas (and other states), i.e. an employee may be discharged "at-will" in Texas unless there is a contract, agreement, or handbook or policy provision that "specifically and expressly limits...and curtails the employer's right to terminate the employee."[7] McAlister v. Medina Elec. Co-op, Inc., 830 S.W. 2d 659, 664 (Tex.App.–San Antonio, 1992, writ denied). Similarly, a contract, agreement, or handbook or policy may also create a property interest in continued employment in the public sector. Roth, at 577-578, citing other Supreme Court cases wherein employees established property interests in continued employment, even without a "formal contract". Roth, at 577-578 It would seem logical to conclude, based on existing law, that a student may be subjected to corporal punishment "at-will" in public schools unless the school contracts, agrees, or publishes a handbook or adopts a policy provision that "specifically and expressly limits...and curtails the district's right to administer corporal punishment" (adapted from the quote in McAlister, cited supra). The distinguishing characteristic of this case is that the general rule relating to "at-will" corporal punishment simply does not apply because the clear and unambiguous language of the WISD policy at issue "specifically and expressly limits and curtails" the WISD and its administrators' rights to administer corporal punishment following a parent's request that the district not

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[7] Conversely, however, an employee will have a property interest in continued employment if such a contract, agreement, or handbook provision does limit the employment-at-will doctrine. McDonald v. City of Corinth, at 155.

administer corporal punishment to a child. Thus, the WISD handbook policy provision must create a protected property interest for Pruitt in keeping her child free from corporal punishment, if she requested that corporal punishment not be administered.

In summary, the application of the principles set forth in Roth to the facts and circumstances of this case compel a holding that Pruitt, as a "parent", was entitled to rely on the District's published policies and the District should not now be allowed to arbitrarily undermine its duly-adopted policies and procedures by arguing that the policies were somehow merely superfluous and not intended to confer any right on the parent to make decisions relating to the education and discipline of his or her child--especially when the Board's policies provided for alternative forms of discipline that were deemed by the Board to be sufficient to manage misbehavior and that would protect the child from corporal punishment and its potential consequence of physical injury.

B. Substantive Due Process. As noted above, the Ingraham Court specifically did not address the issue of substantive due process. However, the Fifth Circuit, in Woodard, did consider and reject the Plaintiff student's claim for violation of substantive due process, noting that the case did not compel an examination of arbitrary and capricious or inhumane and/or shocking abuse of power, since no physical injury was claimed.

The case at bar is distinguishable from Woodard in that Kacal's complaint does include allegations of injury as a result of the unreasonably injurious instrumentality used and the unreasonably severe manner in which discipline was administered. The complaint also alleges that the indiscretion committed by Kacal was relatively minor, i.e. "talking in the hall" on the way to lunch (R. 4, paragraph 16). Further, the original complaint alleged that the instrumentality for administering corporal punishment was unreasonably designed (R.6, paragraph

23) and that the manner in which corporal punishment was routinely administered was arbitrary and capricious and also in violation of the District's official policy relating to corporal punishment (R. 7, paragraph 25).[8]

The Fifth Circuit has held that unreasonable restraint can form the basis of a cause of action for violation of substantive due process. Jefferson v. Ysleta Independent School District, 741 F.2d 303 (5th Cir. 1987). Although the Jefferson case was decided on the basis of a complaint alleging that the restraint was an arbitrary and capricious "educational exercise" (instead of punishment or discipline), the Court's opinion stated that "even if this were punishment, it would not necessarily be protected conduct," citing Woodard at p. 1246. (See Jefferson, cited supra, at 305). The Fifth Circuit has also recognized Jane Doe's substantive due process claim "based upon the premise that school children have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment." Doe v. Taylor Independent School District, 15 F.3d 443, 450 (5th Cir. 1994).

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[8] Plaintiff's counsel noted in the Response to Defendant's Motion to Dismiss that the allegations in the Original Complaint did not include a verbatim statement of the District's officially-adopted policy regulating the manner and means of administering corporal punishment in the absence of parental disapproval; but Plaintiff specifically requested that she be allowed to amend to include the text of the policy and the manner in which the administrators disregarded the policy if the allegations were deemed to be insufficient in this regard. Plaintiff also requested to be allowed to plead additional facts that would establish the cavalier manner in which school officials reacted to the injuries sustained by the Plaintiff, asserting that such pleadings, although largely evidentiary, could lend further support to Plaintiff's allegations relating to the arbitrary, capricious, and inhumane attitude of the officials participating in the process (R. 65).

As noted in Doe, the Fifth Circuit has found the action of a police officer, who struck a tourist with his nightstick and inflicted bodily injury because the officer was annoyed, was sufficient "to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights." Shillingford v. Holmes, 634 F.2d 263, 266 (5th Cir. 1981). This Court must recognize that the law creates a serious inequity if a tourist who suffered "some" physical injury from a blow with a nightstick has a cause of action for violation of due process but a child who suffers physical injury from a blow with a paddle is not similarly protected.

C. Eighth Amendment. Without conceding that the Eighth Amendment should not be applied to protect against injuries inflicted on a school child by an administrator in a school environment, rather than in a prison, Plaintiff does concede that, absent a reversal of this Court's opinion and rationale in Ingraham v. Wright, 430 U.S. 651 (1977), school children are probably not protected against the administration of cruel and unusual punishment as proscribed by the Eighth Amendment, despite the fact that violations of Texas state laws mandating school attendance may now give rise to criminal liability for both children and parents. Tex. Educ. Code §25.093, §25.094; Tex. Code of Crim. Proc., Article 2.12. Pruitt respectfully asserts that the increased criminal liability for parents and children are factors that should be considered by this Court in re-evaluating its position in Ingraham.

Summary

In summary, Petitioner requests this Court to re-visit Ingraham, noting the clear distinctions between this case and the Ingraham situation, and clarifying the guidelines, if any, that may assist parents and schools in making policies relating to corporal punishment.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on January 29, 1998, reverse the judgment of the Fifth Circuit Court of Appeals and remand this case to District Court for trial on the merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CHERYL PRUITT,	§	
INDIVIDUALLY AND AS	§	
NEXT FRIEND OF	§	
TIFFANY KACAL, A MINOR,	§	
Plaintiff,	§	
	§	
VS.	§	**Civil No. W-96-CA-404**
	§	
WACO INDEPENDENT	§	
SCHOOL DISTRICT,	§	
WILLIAM AUFMAN AND	§	
WILLIAM G. GAMBLE,	§	
Defendants.	§	

ORDER

Came on this day to be considered the Defendants' Motion to Dismiss. Having reviewed the motion and response, the Court is of the opinion that Defendants' Motion is meritorious and should be granted.

FACTS

Plaintiff, Cheryl Pruitt ("Pruitt"), brings suit against the Waco Independent School District ("WISD"), William Aufman ("Aufman"), and William G. Gamble ("Gamble") arising from an incident involving corporal punishment administered to Tiffany Kacal ("Kacal") at the G. L. Wiley Middle School. Kacal is the minor daughter of Pruitt. Aufman and Gamble are Vice-Principals at the school.

On November 2, 1995, Mr. Goodman, a teacher at Kacal's school allegedly observed Kacal talking in the school

hallway, a violation of the rules of student conduct adopted by the WISD Board of Trustees. Mr. Goodman reported this incident to Gamble who instructed Goodman that Kacal was to receive corporal punishment (apparently one spanking with a wooden paddle) for the violation. Aufman subsequently administered this spanking to Kacal and others (the number of other students involved is unclear).

Pruitt asserts that she had forbidden the WISD from administering corporal punishment to her child absent notice and specific prior authorization by her. Plaintiff seeks redress under 42 U.S.C. § 1983 for alleged violations of procedural and substantive due process under the Fourteenth Amendment and alleged violations of the Eighth Amendment prohibition against cruel and unusual punishment. Plaintiff also sues under Texas law for breach of contract, fraud, assault and battery.

Defendants move to dismiss the federal causes of action for failure to state a claim upon which relief can be granted. FRCP 12(b)(6). Defendant's further move the Court to decline to exercise jurisdiction over Pruitt's supplemental state law claims and dismiss them without prejudice.

DISCUSSION

A. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." Kaiser Aluminum and chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) (quoting 5C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969)), cert. denied, 459 U.S. 1105 (1983). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Boudeloche v. Grow

Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984); Kaiser, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir. 1986), cert. denied, 476 U.S. (1986). "The question therefore is whether in the light most favorable to plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

B. Eighth Amendment

The Court finds Plaintiff's Eighth Amendment claim is without merit. The Supreme Court has stated that the "Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools." Ingraham v. Wright, 430 U.S. 651, 664 (1976). Plaintiff's response concedes that is no Eighth Amendment claim absent reversal of Ingraham. Accordingly, Plaintiff's Eighth Amendment claim is dismissed.

C. Procedural Due Process

Plaintiff also alleges that the WISD's disciplining of KACAL without notice to Pruitt deprived Pruitt and Kacal of procedural due process. Plaintiff's Original Complaint ¶ 31. Ingraham answers this question as well. In Ingraham, the Supreme Court held that "the Due Process Clause does not require notice and hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law." Id. at 682.

Despite the Supreme court's clear language, Plaintiff argues that Ingraham is distinguishable because the WISD student handbook creates a constitutionally protected property

interest, whereas Ingraham addressed only the liberty interest of the Fourteenth Amendment. According to Plaintiff, the WISD student handbook created a policy which "entitles" parents to make the decision whether or not their child will be subject to corporal punishment, this entitlement giving rise to a property interest which requires procedural due process.

The Court does not agree. Plaintiff has failed to note a single case which holds that a policy statement in a student handbook creates a constitutionally protected property interest, implicating the Due Process Clause. Therefore, the Court declines to extend the Plaintiff's application of Board of Regents of State Colleges v. Roth to the present case. 408 U.S. 564, 578 (1972). Plaintiff's Procedural Due Process claim is dismissed.

D. Substantive Due Process

Plaintiff's final federal claim alleges that the WISD violated her Substantive Due Process rights by disciplining Kacal. Plaintiff's Complaint ¶ 31. Unfortunately, Ingraham did not address whether teacher discipline violated the substantive due process guarantees of the Fourteenth Amendment. Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990). Nonetheless, the Fifth Circuit has held that injuries sustained incidentally to corporal punishment, irrespective of their severity, do not implicate the due process clause if the forum-state provides adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions. In these instances, the states provides all the process constitutionally due. Id. (emphasis added).

The post-punishment civil and criminal remedies in Texas provide sufficient constitutional due process. Tex. Penal Code Ann. § 9.62 (Vernon 1974) (use of force, but not deadly force, justified in educator-student context); Tex. Educ. Code Ann. § 21.912(b) (Vernon 1987) (qualified immunity for

educators imposing corporal punishment upon students). The Fifth Circuit has repeatedly held that no deprivation of substantive due process occurs when a teacher disciplines a child in Texas, because Texas state law "provides adequate state criminal and tort remedies for any excessive punishment that may have been imposed upon the student." Fee, 900 F.2d at 808-9; Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

Finally, this Court notes that in Fee v. Herndon, the mother authorized the use of corporal punishment. 900 F.2d 804,809 (5th Cir. 1990). In the present case, Pruitt allegedly forbid the use of corporal punishment without her consent. That fact does not change the result of this case since both the Supreme Court and the Fifth Circuit have concluded that parental consent to corporal punishment is not constitutionally required. Id. at 809 n.6; Ingraham v. Wright, 430 U.S. 651,662 n.22 (1976) (citing Baker v. Owen, 423 U.S. 907 (1975)). Therefore, Plaintiff's Substantive Due Process claim is dismissed. Accordingly, it is

ORDERED that the Plaintiffs' Eighth Amendment, Procedural and Substantive Due Process claims are DISMISSED. It is further

ORDERED that Plaintiffs' remaining supplemental state law claims are DISMISSED WITHOUT PREJUDICE. It is further

ORDERED that "Defendants' Motion for Leave to File Reply Brief in Support of Motion to Dismiss" is GRANTED. It is further

ORDERED that this case is closed. It is further

ORDERED that all pending motions are DENIED as moot.

SIGNED this 30th day of April, 1997.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Entered: April 30, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-50429
Summary Calendar

CHERYL PRUITT, Individually and as Next Friend of Tiffany Kacal, A Minor

Plaintiff - Appellant

v.

WACO INDEPENDENT SCHOOL DISTRICT; WILLIAM AUFMAN; WILLIAM G. GAMBLE

Defendants - Appellees

Appeal from the United States District court for the Western District of Texas, Waco.

Before JONES, SMITH, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: FEB 20 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-50429
Summary Calendar

CHERYL PRUITT, Individually
and as Next Friend of Tiffany Kacal,
A Minor,

Plaintiff-Appellant,

versus

WACO INDEPENDENT SCHOOL DISTRICT;
WILLIAM AUFMAN; WILLIAM G. GAMBLE,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. W-96-CV-404

Before JONES, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Cheryl Pruitt ("Pruitt") appeals from the district court's order dismissing her claims made pursuant to 42 U.S.C. §1983 for failure to state a claim upon which relief can be granted. Pruitt alleges that she had a property interest, established by the Waco Independent School District's ("WISD's") official policies and her interactions with school administrators, in preventing school officials from administering corporal punishment to her daughter, Tiffany Kacal ("Kacal").[1] She argues that based on this property interest, the administration of corporal punishment to Kacal without first notifying Pruitt was a violation of due process. Pruitt further suggests that the administration of one "lick" with a wooden paddle wrapped in duct tape by school authorities was a violation of Kacal's right to substantive due process and that her daughter should be protected under the Eighth Amendment.

We review de novo the district court's dismissal of a claim under Rule 12(b)(6), accepting all well-pleaded facts as true and viewed most favorably to the plaintiffs. Rolf v. City of San Antonio, 77 F.3d 823, 827 (5th Cir. 1996); Fee v. Herndon, 900 F.2d 804, 807 (5th Cir. 1990). Dismissal is proper only if it appears, based solely on the pleadings, that the plaintiff can prove no set of facts in support of the claims that would entitle her to relief. Rolf, 77 F.3d at 827.

We are unconvinced by Pruitt's argument that her right to procedural due process was violated. She cites no cases in which a school policy has been construed to create a property interest which implicates the Due Process Clause. We further find that Pruitt's pleadings were not sufficient to support her claim that

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[1] Specifically, Pruitt points to WISD's policy which indicates that administrators "shall honor" parent requests not to administer corporal punishment and the WISD disciplinary action manual which does not prescribe corporal punishment as a suitable disciplinary measure for *any* offense committed by a schoolchild.

Kacal's right to substantive due process was violated by the punishment. Pruitt's argument regarding this claim is precluded by the precedent of this circuit. In Fee, we held that injuries sustained incidentally to corporal punishment--irrespective of their severity or the sensitivity of the student--do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions. Fee, 900 F.2d at 808. In such instances, the state provides all the process constitutionally due. Texas provides post-punishment civil and criminal remedies which meet the due process requirements articuated [sic] in Fee. Finally, we address Pruitt's argument that the Eighth Amendment should apply in the public school context. Pruitt concedes that absent a reversal of the Supreme Court's holding in Ingraham v. Wright, 430 U.S. 651 (1977), her argument is futile. In Ingraham, the Court clearly declined to extend Eighth Amendment protection to schoolchildren, finding that the criminal and the schoolchild stand in wholly different circumstances. Id. at 669. Pruitt does not explain how or why the Ingraham decision should be reexamined and thus, her Eighth Amendment argument is also unavailing.

As the plaintiff can prove no set of facts that would entitle them to relief, we AFFIRM for the foregoing reasons as well as those stated by the district court in its order of dismissal. Pruitt v. Waco Indep. Sch. Dist, No. W-96-CV-404 (W.D. Tex. Apr. 30, 1997).

AFFIRMED.

Entered: January 29, 1998